Supreme Court, U.S.
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No. 91-1166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PHONETELE, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INCORPORATED;
BELL TELEPHONE LABORATORIES, INCORPORATED;
PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 11, 1992

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QUESTION PRESENTED

Whether this Court should review the determination of the court of appeals that the factual findings of the district court were supported by the evidence presented at trial.

STATEMENT PURSUANT TO RULE 29.1

Respondent American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to other wholly owned subsidiaries, AT&T has ownership interests in Compagnie Industriali Riunite S.p.A., AT&T Capital Corporation, and AT&T Credit Corporation.

Respondent Western Electric Company, Incorporated ("Western Electric") was formerly a wholly owned subsidiary of respondent AT&T and is now part of AT&T.

Respondent Bell Telephone Laboratories, Incorporated was formerly owned in equal parts by respondents AT&T and Western Electric, and is now part of AT&T.

Respondent Pacific Telephone and Telegraph Company is now known as Pacific Bell. Pacific Bell is a wholly owned subsidiary of Pacific Telesis Group and has no subsidiaries other than wholly owned direct and indirect subsidiaries. Pacific Telesis Group has no parent company and no direct subsidiaries other than wholly owned subsidiaries.

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REASONS FOR DENYING THE PETITION

There is no basis for this Court to review the purely factual question decided by the court of appeals in this case. That decision does not conflict with any decision of this Court or the decision of any other court of appeals. Instead, the decision of the court of appeals applies unchallenged and settled principles of law to the facts of this case.

1. In its petition, Phonetele, Inc. ("Phonetele") asserts that the "real question" posed for review in this case is "what did the finder of fact in the instant case take into

account and how did the [trial] court weigh the evidence" in concluding that defendants had affirmatively justified their conduct (Pet. at 3). That question is answered in the 77-page opinion of the district court in which the court found that Phonetele had "failed to prove any of its antitrust theories" and that defendants had established "by a preponderance of the evidence" that their actions were reasonable and lawful (App. B-155-157).[1] Phonetele argued in the court of appeals that the evidence presented at trial did not support the district court's decision (see App. A-4). The court of appeals reviewed the sufficiency of the evidence for each of the trial court's findings challenged by Phonetele and unanimously affirmed the judgment of the district court (App. A-12-17). The petition offers no reason for further review of Phonetele's inherently factbound contentions. Accordingly, the petition should be denied.

2. The factual contentions in Phonetele's petition are also contradicted by overwhelming evidence in the record. Contrary to Phonetele's assertion that there was no basis for "concern that interconnection could damage the network" (Pet. at 50), the district court found that interconnection posed a "real danger of harm to the network" (App. B-86), and that finding was supported by a report of the National Academy of Sciences commissioned by the FCC to study the technical consequences of interconnection,[2] by the testimony of the AT&T engineers who were responsible for the development of defendants' tariffs,[3]

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[1] The district court's decision is set forth in petitioner's Appendix B (hereinafter "App. B- "). The court of appeals' decision is set forth in petitioner's Appendix A (hereinafter "App. A- "). Reference to defendants' trial exhibits will be identified as "DX " and references to witness testimony will include the name of the witness.

[2] App. A-8; App. B-66-70; DX 132.

[3] Elmendorf, DX 4069 at 5-22, 58; Hough, DX 4137 at 28-29; Goldstein, DX 3235 at 8-23, 27-29, 54-62; Brunson, DX 4044 at 6-8; Watts, DX 4288 at 10-17; DX 47 at App. B.

by a substantial number of examples of actual harms to the network caused by customer-owned equipment,[4] and by several studies which showed that customer-owned equipment was more likely to cause harm than carrier-owned equipment.[5] Moreover, the FCC recognized in *Use of the Carterfone Device*, 13 F.C.C.2d 420 (1968), that interconnection could "adversely affect the telephone company's operations or the telephone system's utility for others" (*id.* at 424), and the FCC specifically authorized the telephone companies to "submit new tariffs which will protect the telephone system against harmful devices" (*id.* at 426). Likewise, the express purpose of the FCC's registration program in effect today is "the protection of the telephone network from harms caused by the connection of terminal equipment" (47 C.F.R. § 68.1 (1991)). Indeed, even Phonetele's own engineers testified at trial that interconnection can cause harm to the network and that "something had to be done to protect the telephone network" from those harms.[6]

Phonetele's contention that defendants' tariffs were unreasonable and anticompetitive was also contradicted by overwhelming evidence at trial. The trial court's findings that defendants' tariffs were reasonably designed to protect the network from harm[7] were supported by the testimony of AT&T's engineers that the tariffs represented their best technical judgment on how best to protect the network from harm,[8] by the report of the Na-

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[4] Brunson, DX 4044 at 8-12 and App. A; DX 285; DX 169; DX 264; DX 263; DX 1700A-1700G; DX 1701-1748.

[5] Artherholt, DX 3200 at 17360-69, 17273; Hunt, 3212 at 15815-29; DX 195; DX 209; DX 217.

[6] Castiglione, Tr. 1307-10; Brouyette, Tr. 1636.

[7] App. B-65, B-86, B-97, B-129-130, B-156-157. The trial court also specifically rejected Phonetele's contentions to the contrary. App. B-62, B-88-89, B-97, B-161 n.13.

[8] Elmendorf, DX 4069 at 23-29; Hough, DX 4137 at 28-42; Brunson, DX 4044 at 12-22; Watts, DX 4288 at 9-23; Emerson, DX 4063 at 16; Goldstein, DX 3235 at 26-37.

tional Academy of Sciences,[9] by the testimony of a former Chief Engineer of the FCC,[10] and by the testimony of a former chief operating officer of a major non-Bell independent telephone company.[11] The evidence at trial also established that the protective connecting arrangement ("PCA") requirement in defendants' tariffs was modeled on a tariff that had previously been prescribed by the FCC for the connection of customer-owned recording devices (App. A-6; App. B-29); that the FCC specifically found that defendants' tariffs did not violate its *Carterfone* decision (App. B-51); and that when the FCC created its registration program in 1975, the PCA requirement was continued in effect for equipment that was not registered with the FCC (App. B-94; 47 C.F.R. § 68.102 (1991)).[12] Finally, the record included over a dozen decisions by state regulatory commissions finding that defendants' tariffs were a reasonable means to protect the network from harm, including two decisions in which the California Commission specifically found that "utility-provided protective connection devices are necessary and appropriate for the Phonemaster" (DX 179; DX 196).[13]

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[9] App. A-8; App. B-71; DX 132.

[10] Spence, DX 3219 at 17150-51.

[11] Alden, DX 4000 at 6.

[12] Phonetele's further claim that defendants "stonewalled any type of certification" (Pet. at 15-16, 28) is specifically refuted by the trial court's findings that defendants "cooperated" with the FCC's development of a certification program (App. B-76, B-91).

[13] There is also no merit to Phonetele's argument that the courts below committed reversible error by their "critical reliance upon economic issues" (Pet. at 15; *see also id.* at 10, 11, 38, 54). In fact, neither of the courts below relied at all on any economic issues. The trial court expressly disavowed any reliance on economic considerations (App. B-80), and the decision of the court of appeals contains only one passing reference to the existence of "economic problems" in the factual background section of its opinion (App. A-7).

3. Contrary to Phonetele's contentions, this case raises no legal issue about how the finder of fact in a monopolization case should weigh conflicting evidence of "predatory intent versus innocent intent" (Pet. at i, 3, 10, 35, 50, 60-61). In this case, the trial court found the evidence that defendants' actions had been motivated by reasonable and genuine concerns about the safety and quality of telephone service to be credible and persuasive, and the court specifically and repeatedly held that Phonetele had not shown defendants' intent to have been predatory (App. B-62, B-88-93, B-97, B-161 n.13). Similarly, the trial court did not find only "some" regulatory justification for defendants' tariffs as Phonetele suggests (Pet. at 61), but that defendants had established at trial each element of the regulatory justification defense prescribed by the court of appeals in *Phonetele I* "by a preponderance of the evidence" (App. B-156). In these circumstances, the decision of the court of appeals holding that there was sufficient evidence to support the factual findings of the district court was plainly correct and presents no issue for review by this Court.[14]

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[14] Contrary to Phonetele's contention (Pet. at 18), there is no conflict between the decision of the court of appeals in this case and the decision in *Litton Systems, Inc.* v. *AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 F.2d 1073 (1984). Although *Litton* involved some of the same regulatory and factual background, that case was decided by a jury on a very different record addressed to different types of equipment, and the court in *Litton* found only that there was sufficient evidence in that record to uphold the jury's verdict. By contrast, based on the markedly different and more complete record in this case, the trial court found here that "the preponderance of the evidence is different than that found in the *Litton* case" (App. B-99), and the court of appeals found sufficient evidence in the record of this case to support the trial court's findings (App. A-12-17, A-19). The different results reached by the triers of fact were thus produced by different factual records and not by any conflict on an issue of law.

Furthermore, following *Litton*, in a case involving the identical equipment at issue in *Litton*, the Court of Appeals for the District of Columbia Circuit refused to give collateral estoppel effect to *Litton*

4. There is also no merit to Phonetele's argument that the court of appeals erred by failing to conduct a *de novo* review of the evidence (Pet. at 54-57). The regulatory justification defense upheld by the trial court was properly based on findings of fact (App. A-12), and the law is clear that findings of fact made by a trial court sitting without a jury "shall not be set aside unless clearly erroneous" (Fed. R. Civ. P. 52(a)).[15]

De novo review would be particularly improper here because Phonetele's case consisted of an attack on defendants' motives and good faith in virtually all facets of their dealings with Phonetele. To refute Phonetele's allegations, defendants put on the witness stand at trial those employees whose honesty and good faith Phonetele had challenged so that the district court could hear their testimony firsthand, observe their demeanor on cross-examination, and judge their credibility.[16] The trial court's rejection of Phonetele's claims reflected the court's assessment of the credibility of these witnesses as

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because of the erroneous exclusion of state regulatory decisions approving defendants' tariffs from the evidence in *Litton. Jack Faucett Associates, Inc.* v. *AT&T*, 744 F.2d 118 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). *Accord, Glictronix Corp.* v. *AT&T*, 603 F. Supp. 552, 574-75 (D.N.J. 1984); *General Dynamics Corp.* v. *AT&T*, 650 F. Supp. 1274, 1288-89 (N.D. Ill. 1986). Similarly, the district court below rejected Phonetele's attempt to assert offensive collateral estoppel based on *Litton* on the ground that the cases, although similar in some respects, were fundamentally different. *Phonetele, Inc.* v. *AT&T*, 1984-1 Trade Cases ¶ 65,921, at 67,970-71 (C.D. Cal. 1984). Phonetele has not appealed that decision.

[15] Although Phonetele argues that a different standard of review should be applied in "a documents case" (Pet. at 55), Rule 52(a) was amended in 1985 specifically to make clear that the clearly erroneous standard applies to all findings of fact "whether based on oral or documentary evidence" (Fed. R. Civ. P. 52(a)). *See* Advisory Committee Note to 1985 Amendment. *See also Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574-75 (1985).

[16] As Phonetele told the district court, "the credibility of the witnesses, indeed, the credibility of the entire Bell position, is at the heart of this case" (Phonetele Memorandum filed Nov. 23, 1983, at 2).

well as the credibility of petitioner's witnesses (see, *e.g.*, App. B-93). As this Court stated in *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985), when findings are thus based on the credibility of witnesses, "Rule 52(a) demands even greater deference to the trial court's findings." [17]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[17] Phonetele's additional argument that the trial court committed reversible error by taking too long following the trial to issue its decision is wholly without legal or factual basis. As Phonetele admits (Pet. at 34 n.9), there is "no case holding that a district court commits reversible error by taking too long to decide a case" (App. A-18), and such a rule would not be a sensible means to reduce delay (*id.*). Moreover, Phonetele made no showing of prejudice or error from the passage of time (*id.* at A-17-18).

Likewise, there is no basis for review of Phonetele's recusal argument in this case. Phonetele never made any suggestion that the trial judge should recuse himself. After the trial judge had issued his decision rejecting Phonetele's claims, however, Phonetele's president, Robert Feiner, filed a complaint of judicial misconduct with the court of appeals charging that the trial judge had done "a first class hatchet job as an agent of the defendants" by making "outrageous findings" against Phonetele. Mr. Feiner's complaint, which was dealt with in a separate proceeding, was dismissed as "frivolous" by the court of appeals. *In re Charge of Judicial Misconduct*, Nos. 89-80366, 89-80367 (9th Cir. June 12, 1990). Those allegations were never presented in this case. There is nothing at all in the record of this case regarding those allegations, and there is nothing regarding those allegations in the decision of the court of appeals that Phonetele is now asking this Court to review.